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don, No 62. p. 4746; Kersland against the Viscount of Strathallen*; Caldwall's Heirs against General Dalzell's Heirs, (*infra*). To the 3*d*, That he was a creditor; *Answered*, He could not but know how horribly unjust the first doom of forfeiture was, for explaining the test, and yet most officiously he bought in debts upon the estate, not being a creditor before. 2*do*, The Earl is content to pay his father's debts, but most of these were his grandfather's the Marquis's debts, whom he noways represents; and the rule *qui suum recepit* has many *fallantiæ*; for what if a creditor come to take his own *manu forti*, *suum recepit*, and yet he will be a robber in the case; so it must be understood where the payment is voluntary, and where there is a debtor; but here there was no willing payment, neither was Argyle debtor any more, he standing forfeited. And Carse's decision does not meet, for he was not Bramford's creditor, but a creditor to the estates, who had forfeited Bramford. But here there was neither a true debtor nor voluntary payment, but stretches made to be a handle to make their benefit by their neighbour's calamity. *Replied* for my Lord Athole, All lawyers agree that restitutions have no retrospect *ad præterita*, else this would strike at the root of the most innocent possessions, to disturb the quiet enjoyment of the same, while we are under the dread and apprehension that we must sometime be forced to restore, which were a terrible preparative; and the 35th § *Instit de rer. divis.* says, that *dominus superveniens de fructibus perceptis agere non potest*, and *Novel.* 115. *cap.* 3. states the case of one forfeited for heresy, if he afterwards be converted, the forfeiture rescinds, and he gets back his goods, yet he has no right to the fruits preceding his restitution. See Gayll, lib. 2. Observ. 18. and *Ant. Perez. ad tit. C. de sententiam passis.* And the learned Mathæus *de criminibus*, *cap. de indulgentia principis*, *fructos perceptos non recuperabit*; and add here, *Nicolaus Antonii de exilio jureque exulum.* And, in our very reductions they only take effect from the date of the interlocutor finding the writ null, but the *bona fides* secures them *quoad* bygones. The Lords had no occasion to decide this, because my Lord Marquis redeemed his trouble by paying 24,000 merks of composition to the Earl, for a discharge of his claim.

Fountainhall, *v.* 2. *p.* 31. & 47.

No 65.

The representative of a donatar of a forfeit person being sued upon the act rescissory 1690, by the heir of the rebel, it was found that the defender be-

1705. *December* 5. Caldwall *against* Dalzell.

William Muir of Caldwall being forfeited in 1667, for the rising at Pentlandhills, and his forfeiture being gifted to General Dalzell, and this being rescinded not only by the general act in 1690, but likewise by a special act, the Heiress of Caldwall pursues Sir Thomas Dalzell, as representing his father, and his goodsire, the General, for repaying the rents of these lands, intromitted with by them from the date of the gift in 1669, to the restitution in 1689, be-

* See General List of Names.

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hoved to account, not only for bygone actual intromissions, but for the rent of the estate when he entered to possession, and even for omissions, the pursuer proving what the rental was, and that the donatar had a general intromission; allowing to the defender the usual deductions for waste rooms.

ing twenty years. *Alleged*, As to any intromission had by his grandfather, he acknowledged his representation of him, and was ready to hold count; but *quoad* his father, he nowise represented him, and so could not be liable for his intromission; seeing the right made by the General was to the defender's father in liferent, and to himself in fee. *Answered*, The defender's father being a gratuitous assignee, his intromission was no better than if he had been his father's factor, in which case he was still liable, especially seeing it was fraudulent betwixt father and son, and so quarrellable on the act of Parliament 1621; and the act rescissory in 1690 speaks not only of the donatars refunding bygone rents, but likewise of their assignees. THE LORDS found Sir Thomas liable not only for his grandfather the General's intromissions, but likewise for his father's, who was a voluntary gratuitous assignee. Then it was *alledged* for the defender, in the second place, That he could be liable only for their actual intromissions, as the same shall be proved by discharges under their hands *scripto*, seeing they were *bonæ fidei* possessors at the time, conform to the laws then standing, and so ought not to be stretched against them. *Answered*, They opponed the act rescissory, ordaining it to be understood in the amplest form the words could bear; and to count only for actual intromissions, now after so long a time, would wholly elude and frustrate the restitution designed by the act; seeing discharges to tenants being small papers, may be now lost or abstracted, or it may be that none were given, but only marked in the master's count-book; so to count after that manner is just nothing at all. Some thought this restitution of the bygone rents a severe clause; but the rescission of the forfeiture being *per modum justitiæ*, and made so close of purpose, to discourage the seeking gifts of forfeiture, the LORDS found he behoved to count not only for his predecessor's actual intromissions, but conform to the rental of the estate, when he entered to the possession; they proving always what the rental was, and that he entered to the possession, and had a general and promiscuous intromission universally over all; as appeared by the decision marked by Stair, 28th January 1674, General Dalzell *contra* the Tenants of Caldwall, No 26. p. 4685, where he quarrelled their tacks as set beneath their true value; but prejudice to the defender to discharge himself by proving, that the rooms stood waste, or by his losses by depauperate tenants, and the other usual deductions. See the parallel case decided Baillie of Jerviswood *contra* the Duke of Gordon, No 62. p. 4746; as also the case betwixt Argyle and Athole, No 63. p. 4748. Some adduced the instance of adjudgers and apprisers entering to possess within the legal, that either the co-creditors or debtors will oblige them to count for the whole rent unless they instruct *quomodo* they were debarred; but a donatar to a forfeiture is in a different case, for he being *dominus* and proprietor for the time, he cannot be brought under the rule of 'ought and should,' but may intromit or not at his pleasure; but if it be proven, that he once enters to the possession, law presumes against him that he continued, unless he instruct either a legal or forcible debarment, *via juris vel facti*; and though it cannot

No 65. be pretended he possesses *tanquam prædo*, which would make him liable to violent profits, yet there is such a rotation in human affairs, that they who take gifts of forfeiture, should remember they are not very secure, and a time of restitution may come; forfeitures being often rescinded with us on every turn and change of government, as appears by the rescissory acts in the Parliaments 1661 and 1690; and by many other examples. However, the restitution of bygones seemed very hard to some; the answer was, *Durum est, sed ita lex scripta est.*

Fol. Dic. v. 1. p. 315. Fountainhall, v. 2. p. 297.

1724. *January* 21.

The EARL of DELORAIN *against* The DUTCHESS of MONMOUTH and BUCCLEUGH.

No 66.

The Dutchess of Monmouth obtained a gift of the Duke's forfeiture, and in virtue of it recovered his personal estate. She afterwards granted to her son, the Earl of Delorain, for love and favour, a bond for L. 20,000, which she paid to him. After the act 18, Parliament 1690, rescinding all forfeitures since 1665, and restoring the heirs against the donatars, was passed, the Earl brought an action against his mother, for the value of his father's personal estate. The Lords found that the gift of the Duke's forfeiture, under the Great

ANNO 1685, the late Duke of Monmouth was attainted of high treason in England, and suffered.

In the same year, after his decease, a process was carried on against him in Scotland for high treason, before the Court of Justiciary, and a doom of forfeiture was recovered.

Anno 1686, the Dutchess of Buccleugh his relict obtained a gift of the Duke's forfeiture, in virtue whereof she recovered his personal estate, which consisted chiefly in arrears of rents.

Anno 1688, Her Grace the Dutchess, for the love and favour she bore to Lord Harry Scot, now Earl of Delorain, her second son by the Duke of Monmouth, granted him a bond for L. 20,000 Sterling; which bond was since that time paid.

Anno 1690, by the act 18. Parliament 1. Sess. 2. William and Mary, entituled an act rescinding the forfeitures, &c. since the year 1665, all dooms of forfeiture pronounced from that period, and particularly that of the Duke of Monmouth, are rescinded, and all forfeiting persons, their heirs and successors, rehabilitated and restored to their goods, &c. and to all and sundry their lands, heritages, tacks, steadings, debts, and possessions; and all donatars of forfeitures made accountable to forfeiting persons, their heirs and successors, for all sums received by them.

The Earl of Delorain, as executor decerned to his father the Duke of Monmoth, brought an action against the Dutchess, concluding payment of L. 50,000 Sterling, as the personal estate of his father, to which he was entitled in virtue of the general act rescissory, and with which the Dutchess had intromitted.

It was *pleaded* in defence for the Dutchess, 1*mo*, That though by the general act rescissory, the doom of forfeiture pronounced against the Duke in Scotland was repealed; yet his Grace having been forfeited by a different sentence in England, which was under the same Sovereign with Scotland, and which sen-